LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 69

PAUL H. BREITHAUPT, PETITIONER,

vs.

MORRIS ABRAM, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

PETITION FOR CERTIORARI FILED OCTOBER 1, 1954

CERTIORARI GRANTED APRIL 23, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 69

PAUL H. BREITHAUPT, PETITIONER,

vs.

MORRIS ABRAM, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

INDEX

	Original	Print
Proceedings in the Supreme Court of the State of New Mexico	1	1
Petition for writ of habeas corpus	4	1
Exhibit "A"—Commitment	6	2
Order for writ of habeas corpus to issue	7	3
Writ of habeas corpus	8	4
Return to writ of habeas corpus	9	4
Opinion, Fox, J.	10	5
Excerpts from transcript of testimony from the Fifth Judicial District Court in and for Eddy County of the State of New Mexico	18	12
Excerpts from testimony of A. B. Muney, direct	38	12
Note re objections and rulings thereon	59	14
Testimony of Dr. C. A. Stryjewski, direct	60	15
cross	63	18
redirect	68	21
recross	69	22
redirect	69	22
recross	69	23
Dr. C. L. Womack, direct	78	23
Order granting leave to proceed in forma pauperis and petition for writ of certiorari	81	24

[1-4] In Supreme Court of New Mexico

[File endorsement omitted]

PETITION FOR WRIT OF HABEAS CORPUS—Filed July 30, 1953

To: The Honorable Justices of the above-entitled Court:

F. Gordon Shermack, Attorney, having been appointed by the Court in this matter, states:

1. That Paul H. Breithaupt, the person in whose behalf this Writ is applied, is imprisoned in the State Penitentiary, Santa Fe County, New Mexico, by Warden of said Penitentiary, Morris Abram.

2. That Paul H. Breithaupt is not committed by virtue of any process, judgment, decree or execution specified in Section 25-1101 N. M. S. A., 1941.

3. That the cause of such confinement according to the knowledge and belief of your petitioner is a commitment from the District Court of Eddy County, New Mexico, a copy of which is attached hereto and identified as Exhibit A.

4. That said imprisonment is alleged to be illegal for the following reasons, to-wit: That the petitioner was denied due process of law through the use of the results of a blood test made on blood taken from his body while he was unconscious, thereby compelling him to give evidence against hemself, which evidence was gained by an unlawful search and seizure in violation of the Constitution of the United States, Amendments 4, 5, and 14, and the Constitution of the State of New Mexico, Article 2, Section 18.

[5] 5. That Petitioner has previously applied to the District Court for Santa Fe County for a Writ of Habeas Corpus, which Writ was denied March 7, 1952.

WHEREFORE, Petitioner prays that a Writ of Habeas Corpus may issue, directed to the said Morris Abram, commanding him to have the body of the said Paul H. Breithaupt, by him imprisoned and detained, before the Court, at a time and place therein specified, to do and receive what shall then and there be considered concerning the said Paul H. Breithaupt, together with the time and

cause of such imprisonment and detention, together with said writ.

Dated this 30th day of July, 1953.

F. GORDON SHERMACK,
Attorney for Petitioner.

Duly sworn to by F. Gordon Shermack jurat omitted in printing.

---

[6] EXHIBIT "A" TO PETITION

COMMITMENT TO PENITENTIARY

STATE OF NEW MEXICO

To the Sheriff of Eddy County and to the Superintendent or Warden of the New Mexico State Penitentiary, situated at Santa Fe, In the State of New Mexico, Greeting:

WHEREAS, At a regular term of the Fifth Judicial District Court of the State of New Mexico, begun and held within and for the County of Eddy on the 2nd Monday of March, 1951, and on the 8th day of said term, the same being the 5th day of April, 1951, Paul H. Breithaupt was duly convicted of the crime of Involuntary Manslaughter and by the said Court sentenced to imprisonment for the full term of not less than six years and not more than ten years beginning with the 29th day of March, 1951, such imprisonment to be in the New Mexico State Penitentiary, situated at Santa Fe, in the State of New Mexico;

THEREFORE, You the Sheriff of Eddy County, are hereby commanded to take the said Paul H. Breithaupt in custody and deliver him, together with this writ, to the said Superintendent or Warden of the said State Penitentiary, or to some other duly authorized Agent of the Superintendent or Warden; and you, the Superintendent or Warden of the New Mexico State Penitentiary, situated at Santa Fe, in the State of New Mexico, are hereby commanded to receive the said Paul H. Breithaupt and safely and securely confine him, the said Paul H. Breithaupt in said New Mexico State Penitentiary, situated at Santa Fe, in the State of New Mexico, for the full term of not less than

six years and not more than ten years beginning with the 29th day of March, 1951, and this writ shall be your sufficient warrant for so doing.
(Seal)

FIFTH JUDICIAL DISTRICT

D. C.

EDDY COUNTY, NEW MEXICO

WITNESS THE Hon. C. Roy Anderson Judge of the Fifth Judicial District Court, and the seal of said Court, this 5th day of APRIL A. D., 1951.

(signed) MARGUERITE E. WALKER,
Clerk of the District Court,
Eddy County, New Mexico.

---

[7] In Supreme Court of New Mexico

[File endorsement omitted]

ORDER FOR WRIT OF HABEAS CORPUS TO ISSUE—Filed July 30, 1953

Upon reading and filing the Petition of Paul H. BREITHAUPT, duly signed and verified on his behalf by his attorney F. Gordon Shermack, whereby it appears that the Petitioner is illegally imprisoned and restrained of his liberty by Morris Abram, Warden of the State Penitentiary at Santa Fe, New Mexico, and stating wherein the alleged illegality consists, from which it appears to me that a writ of habeas corpus ought to issue:

It is ordered that a writ of habeas corpus issue out of and under the seal of the SUPREME COURT OF THE STATE OF NEW MEXICO, directed to the said Morris Abram and the Sheriff of Santa Fe County, commanding them to have the body of the said PAUL H. BREITHAUPT before the SUPREME COURT OF THE STATE OF NEW MEXICO, in the courtroom of said court, at the county of Santa Fe, on the 10th day of August, 1953, at 9 o'clock A. M., of that day, to do and receive what shall then and there be considered concerning

the said Petitioner, PAUL H. BREITHAUPT, together with the time and cause of his detention, and that they have then and there the said writ.

Dated this 30th day of July, 1953.

JAMES B. McGHEE,
Acting Chief Justice of the Supreme Court.

---

[8] In Supreme Court of New Mexico

[File endorsement omitted]

WRIT OF HABEAS CORPUS—July 30, 1953

The State of New Mexico to the Sheriff of Santa Fe County and Morris Abram, Warden of the State Penitentiary:

YOU ARE HEREBY COMMANDED to have the body of PAUL H. BREITHAUPT by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, before THE SUPREME COURT OF THE STATE OF NEW MEXICO, on the 10th day of August, 1953, at 9:00 a.m. o'clock and in the COURTROOM of the SUPREME COURT BUILDING in Santa Fe, New Mexico, at which time said Court will receive what then and there will be considered concerning the said Paul H. Breithaupt and have you then and there this writ.

WITNESS THE HONORABLE DANIEL K. SADLER, Chief Justice of the Supreme Court of the State of New Mexico, attested by my hand and seal of said Court this 30th day of July, 1953.

LOWELL C. GREEN,
Clerk.

---

[9] In Supreme Court of New Mexico

RETURN TO WRIT OF HABEAS CORPUS—Filed August 17, 1953

Comes now the Respondent, Morris A. Abram, Warden, of the State Penitentiary of the State of New Mexico, by his attorney Richard H. Robinson, Attorney General, and

Walter R. Kegel, Assistant Attorney General, and as his return in the above entitled and numbered cause, states:

1. That at the present time Petitioner is in the Respondent's custody at the State Penitentiary of the State of New Mexico, at Santa Fe, New Mexico.

2. That Petitioner was committed to the State Penitentiary on the 5th day of April, 1951, for a term of not less than six years and not more than ten years for the crime of Involuntary Manslaughter.

3. That Petitioner is held by authority of a final commitment executed by the District Court of the Fifth Judicial District, State of New Mexico on the 5th day of April, 1951, a copy of which commitment is attached to the Petition in this cause and is made a part hereof by reference.

W. R. Kegel,
WALTER R. KEGEL,
Assistant Attorney General.

[File endorsement omitted.]

---

[10] In the Supreme Court of the State of New Mexico

No. 5696

PAUL H. BREITHAUPT, PETITIONER

vs.

MORRIS ABRAM, RESPONDENT

OPINION—Filed June 15, 1954

ORIGINAL PROCEEDING IN HABEAS CORPUS

[11] OPINION

Fox, D. J.

This is an original proceeding in habeas corpus brought by the petitioner, Paul H. Breithaupt, against the Warden of the New Mexico State Penitentiary, Morris Abram, respondent.

The petitioner was the driver of a pickup truck which collided with another motor vehicle. The collision resulted in the death of three persons all of whom were riding in the vehicle with which the petitioner's pickup collided. A pint bottle containing about an inch of whiskey was found in petitioner's vehicle and the odor of alcoholic liquor was noticed on petitioner's breath. The petitioner was taken to the hospital following the accident and there, and while petitioner was unconscious, a blood sample of about 20 ccs was withdrawn by the doctor on duty at the direction of a state patrolman. The blood sample was found to contain 17% alcohol. This percentage was, in the opinion of the doctor who testified at the trial, sufficient to cause the petitioner to be under the influence of alcohol. The details of the collision are purposely omitted as being of no value in a determination of the case. The petitioner was charged with the crime of involuntary manslaughter and convicted. No appeal was taken from petitioner's conviction in the district court and the time for such appeal has expired.

The points upon which petitioner relies as grounds for the issuance of the writ are:

> "1. The time for an appeal or writ of error having passed, habeas corpus is the proper remedy to raise the issue of denial of due process.
>
> "2. The admission of evidence based on the results of a blood test made of a blood sample taken from the petitioner while he was unconscious, the use of which was protested both at the preliminary hearing and at the trial in district court, was a denial of due process."

More particularly, petitioner contends that the facts herein amount to compelling him to give evidence against him-
[12] self, which evidence has been obtained by an unlawful search and seizure in violation of Amendments 4, 5 and 14 of the United States Constitution, and Article 2, Section 18 of the Constitution of the State of New Mexico.

The record shows, without dispute, that the petitioner during the course of his trial interposed timely objections to the admission of evidence in respect to the blood test and the results of such test on the ground that the admis-

sion of such evidence would be a violation of the self-incrimination provisions of our state constitution.

The decision of the court in this case will be restricted to a consideration of whether or not the taking of the blood sample in question and the admission of the results of a test made of such sample in evidence at the trial of this cause was a denial of due process under the provisions of the 14th Amendment of the Constitution of the United States. It is conceded by the respondent and this court that a review of this question may be made by this court in a habeas corpus proceeding. See Rochin v. California, 342, U. S. 165, 72 S. Ct. 205, 96 L.Ed. 183, 25 A.L.R. 2d 1396; Johnson v. Zerbst, 304 U. S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; U. S. v. Smith, 331 U. S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610; Price v Johnston, 334 U S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356; Hawk v. Olson, 326 U. S. 271, 66 S.Ct. 116, 90 L.Ed. 61; Huffman v. Alexander, 197 Ore. 283, 253 P.2d 289; Commonwealth ex rel. Johnson v. Burke, 173 Pa. Sup, 105, 93 Atl 2d 876; and Ex Parte Moutaw (Okla. 1951) 236 P. 2d 509.

The case upon which the petitioner chiefly relies is Rochin v. California, supra. In the Rochin case, three deputy sheriffs, upon receipt of information that the petitioner, Rochin, was selling narcotics, entered the petitioner's dwelling without warrant or authorization and then forced open the door of Rochin's room where they found Rochin [13] sitting on his bed. The officers spotted two capsules on a table by the bed but Rochin seized them before the deputies were able to so do. Rochin put the capsules in his mouth and a struggle ensued but the officers' attempt to extract the capsules from Rochin's mouth was unsuccessful. Rochin swallowed the capsules. The officers then handcuffed Rochin and took him to a hospital where, at the direction of one of the officers, a doctor forced an emetic solution through a tube into Rochin's stomach and against his will. This action produced vomiting and two capsules containing morphine were found in the vomited matter. Rochin was brought to trial and convicted on a charge of possessing a preparation of morphine, contrary to state law. The chief evidence against him was the two capsules which were admitted over Rochin's objection. The case was appealed to the Supreme Court of the United States where

it was held that Rochin had been denied due process of law, in violation of the federal Constitution and the case was reversed.

Due process is a legal proposition of difficult definition. In order to more clearly appraise the meaning and intent of the due process clause and the decision in the Rochin case, supra, in respect to the matter of due process, the following language from the majority opinion is quoted:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski v. New York, (324 U. S. 401, at pps. 416-417 . . . Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' . . . or are 'implicit in the concept of ordered liberty.'
>
> * * * * * * *
>
> "Applying these general considerations to the circumstances of the present case, we are compelled to [14] conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.
>
> ". . . Due Process of law, as a historic and generative principle, precludes defining, and thereby confin-

ing, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' "

It should be noted that in the case of Wolf v. Colorado, 338 U. S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, the majority held that the conviction by a state was not a denial of due process under the 14th Amendment of the United States Constitution solely because evidence admitted by the trial court was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a Federal law in a Federal court because of an infraction of the 4th Amendment of the United States Constitution as applied in the case of Weeks v. U. S., 232 U. S. 383, 34 S.Ct. 341, 58 L.Ed. 652, L.R.A. 1915B, 834, Ann.Cas. 1915C, 1177. In the opinion in the Wolf case, supra, it was stated that a clear majority of the State decisions have rejected the doctrine of the Weeks case, supra, including New Mexico in the case of State v. Dillon, 34 N.M. 366, 281 P. 474.

The two New Mexico decisions dealing with the matter of admission of evidence obtained in violation of a defendant's constitutional rights are the Dillion case, supra, and State v. Barela, 23 N.M. 395, 168 P. 545, L.R.A. 1918B, 844. The Barela case, supra, held that a law officer may force a suspect to remove his shoes and compare them with tracks found near the scene of the crime. The court in the Barela case made the distinction between real evidence. [15] and oral evidence obtained by compulsion and held that the self-incrimination privilege contained in Article 2. Section 15 of the New Mexico Constitution was not violated. The court went on to hold that the fact of the evidence being obtained by unlawful search and seizure did not render it inadmissible inasmuch as the method used in obtaining the evidence does not affect its admissibility. In the Dillion case, supra, this court held that liquor seized under an illegal search warrant is admissible as the use of such evidence was not in violation of constitutional immunities from unreasonable search and seizure and compulsory self-incrimination as provided in Sections 10 and 15 of Article 2 of the New Mexico Constitution.

What then is the effect of the Rochin case? A recent California case, People v. Haeussler, 41 Cal. 2d 252, 260

P. 2d 8, dealing with a factual situation very nearly identical to the case here to be decided, and decided after the decision by the United States Supreme Court in the Rochin case, supra, held that the doctrine of the Rochin case did not apply. The court in the Haeusler case, supra, interpreted the Rochin decision as applying the due process clause only where there is such conduct as amounts to the exertion of a brutal and shocking force to acquire evidence. If such conduct exists then the due process clause should be brought into play to invalidate any conviction based upon the use of such evidence.

For other discussions and interpretations of the Rochin decision see Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct 725, 96 L. Ed. 919; Brown v. Allen, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469; Brock v. North Carolina, 344 U.S. 424, 73 S. Ct. 349, 97 L. Ed. 456; Albertson v. Millard, 106, F. Supp. 635; State of Arkansas v. Central Surety and Ins. Corp., 102 F. Supp. 444; People v. Sica, 112 Cal. App. 2d 574, 247 P. 2d 72; Wash. U. L. Q., 1952, 471; 9 Wash & Lee L. Rev. 192; 3 Syracuse L. Rev. 192; 3 Syracuse L. Rev. 378; 4 Stan. L. Rev. 591; 6 Rutgers L. Rev. 612; 27 Notre Dame Law. 453; 23 Miss. L.J. 293; 50 Mich L. Rev. 1367; 66 [16] Harv. L. Rev. 122; 15 Georgia B.J. 86; 21 Ford L. Rev. 287; and 40 Calif. L. Rev. 311.

The California court went on to state affiratively in the Haeussler case, supra, that a blood test taken in the usual manner is not in and of itself so brutal and shocking as to warrant the application of the Rochin doctrine. With this position we agree.

To better understand the view of the majority opinion in the Haeussler case, supra, as to the Rochin case, supra, the following is quoted therefrom at p. 12:

> "The essence of the Rochin decision is in the court's reference to Brown v. State of Mississippi, 297 U. S. 278, 56 S.Ct. 461, 80 L.Ed. 682, and other coerced confession cases. In the Brown case, a conviction based upon a confession obtained by torture was reversed because such a practice amounted to a wrong 'so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void'. 297 at page 286, 56 S.Ct. at page 465. So, in the Rochin case, the court said: 'Use of involun-

tary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even through statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.' 342 U.S. at pages 173-174, 72 S.Ct. at page 210, 96 L.Ed. 183. In brief, the Rochin case holds that brutal or shocking force exerted to acquire evidence renders void a conviction based wholly or in part upon the use of such evidence.

". . . the Rochin opinion does not rest upon the premise that the taking of evidence from the person of a defendant or by entry into his body is the decisive factor. Instead, the entire course of conduct was examined and found to be brutal and shocking. The court disclaimed any intent to fix rigidly the confines of due process by asserting that they must remain 'indefinite and vague'. That blood tests and similar techniques may stand against constitutional objection is suggested by the statement: 'We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrong-doers and bringing them to book. It does not fairly represent these decisions to suggest that they [17] legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record.' 342 U.S. at page 174, 72 S.Ct. at page 210."

Returning then to the specific question before the court, it would seem clear that unless there is to be a departure by this court from the principles laid down many years ago in the Barela and Dillon cases, supra, then the petitioner's application must fail. It is true that the patrolman directing the withdrawal of the blood sample appears to have violated certain of petitioner's rights but the ad-

mission of the disputed testimony is not thereby prohibited by the decisions of this court. Compulsory or involuntary testimony from a defendant may and should be excluded but the rule in this jurisdiction has not been extended to cover real evidence or the case at hand.

We do not take issue with the results of the Rochin decision, supra. Any radical departure from traditional concepts of justice and fairness should find neither solace nor condonation in the courts. A conviction based upon facts amounting to a denial of due process should not be allowed to stand. This court does not, however, accede to the petitioner's proposition. The decisions of this state and a clear majority of our sister states are aligned against the contention of the petitioner, in the absence of facts sufficient to draw the case within the orbit of the due process clause as applied in the Rochin case. The petition for a writ of habeas corpus is therefore denied, and

IT IS SO ORDERED.

ROBERT E. FOX,
District Judge.

We Concur:
JAMES B. McGHEE,
C.J.
J. C. COMPTON,
J.
EUGENE D. LUJAN,
J.
AUGUSTUS T. SEYMOUR,
J.

[18-37] In the Fifth Judicial District Court in and for Eddy County of the State of New Mexico

Excerpts from Transcript of Testimony

[38-45] Mr. A. B. MUNCY a witness called by the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. REESE:

[46] Q. And did you see the defendant, Paul Breithaupt, here in Carlsbad?

A. Yes, sir.

Q. Where?

A. In the hospital at Carlsbad.

Q. Which hospital was that?

A. I believe it is the—Oh, I don't remember. I can't call the name of the hospital. It is the biggest hospital here, Memorial or something.

Q. Had you been informed that he had been taken to that hospital?

A. Yes, sir.

Q. Was he conscious or unconscious at the time you saw him?

A. He was unconscious.

(Recess and discussion off the Record.)

By Mr. REESE:

Q. I believe you stated in answer to my last question, Officer Muncy, that you did go to the hospital and see the defendant, Paul Breithauut there?

A. Yes, sir.

Q. Where was he when you saw him?

A. In one of the hospital rooms on an emergency table.

[47-48] Q. Was there anyone there attending to him at that time?

A. One of the Sisters was there and a doctor was there, yes sir.

Q. Which doctor was it, if you know?

A. I don't know which doctor was in there at that time.

[49-58] Q. Now, after you had decided that the man was—had the odor of intoxicating liquor on his breath, what did you do?

A. I asked if it was possible to have a blood test.

Mr. WARDEN: If the Court please, at this time, I desire to interpose a formal objection.

The COURT: All right, sir, proceed.

Mr. WARDEN: At this time, the defendant objects to any testimony relative to any blood test taken from this defendant unless it is shown conclusively by the State that the defendant voluntarily submitted to a blood test for the purpose of determining his intoxication or sobriety, and if it is not so shown to be entirely voluntary on the part

of the defendant, then I move that all such evidence be excluded from the record on the ground that to receive such evidence without the consent of the defendant is a violation of his constitutional right against self incrimination.

The COURT: All right, sir. I will let your objection to these qualifying questions and I will make a ruling at such time as the qualification has been completed.

By Mr. Reese:

Q. What was the defendant's condition at that time as to consciousness?

A. He was unconscious as far as I could tell.

Q. Now, did you obtain a blood specimen at that time?

A. Yes sir.

Q. And how was that done?

A. Dr. Womack, I believe is his name, took this blood test.

Mr. WARDEN: If the Court please, I believe it is proper to renew my objection at this time.

The COURT: All right, sir.

By Mr. Reese:

Q. What did you do with the blood that was obtained?

A. Took it to Artesia; had Dr. Stryjewski run an alcohol test on it.

Mr. WARDEN: I object to that last answer. That is obviously hearsay, what the Doctor did.

The COURT: You instructed him to run a test on it, did you, sir?

A. Yes sir.

The COURT: All right.

[59] NOTE RE OBJECTION AND RULING THEREON

(Jury excused and objections made as to proof of blood tests made by following witness—overruled.)

The COURT: Gentlemen, is this the witness by whom you expect to prove the contents of the blood sample taken?

Mr. REESE: Yes sir.

The Court: You may complete your objection now.

Mr. Warden: At this time, the defendant objects to the introduction of any evidence by any witness relating to the results of a laboratory analysis of a blood test taken from this defendant unless the state shows that the sample of blood was voluntarily given by the defendant on the ground that to permit the introduction of such testimony would be a violation of the defendant's constitutional right not to be compelled to testify against himself, or what we commonly call his right of self incrimination.

The Court: Any other objections?

Mr. Warden: That is the substance of my objection, Your honor.

The Court: The objection is overruled. I am inclined to the opinion that under the case that was shown me, the law in New Mexico is that such evidence is admissible. Is there any objection to an admission to the qualifications of this gentleman to make such a test; can you admit then that he is duly qualified to make such a test and to state his results derived?

Mr. Warden: I have no basis to challenge his qualifications, Your Honor.

The Court: Do you desire to challenge them?

Mr. Warden: No.

The Court: Then such an admission will be made?

Mr. Warden: I would rather the evidence be put on in a normal manner.

[60] Dr. C. A. Stryjewski, a witness called by the State, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. Reese:

Q. State your name, please?
A. Dr. C. A. Stryjewski.
Q. Where do you live, Dr. Stryjewski?
A. Artesia.
Q. Artesia, New Mexico?
A. Yes sir.
Q. You are a duly qualified and licensed Osteopathic Physician and Surgeon?

A. Yes sir.

Q. Practicing in Artesia?

A. Yes sir.

Q. In the course of your profession, Dr., have you had occasion to make blood analysises?

A. Yes, we have been doing them routinely.

Q. Can you speak a little louder, please?

A. We have been doing them routinely.

Q. For whom?

A. For the City Police of Artesia.

Q. And have you made analysis for the alcoholic content of the blood?

A. Yes sir.

Q. Approximately how many of those tests would you estimate you have performed?

A. I don't recall off hand. Over fifty. Fifty by this method that I use.

[61] Q. How are analysises made to determine the alcoholic content of the blood?

A. Well, it is a fairly involved chemical proceedure. We have special equipment known as a Covert flask (phonetic); in it we place a blood sample in a little cup within the flask and the bottom of the flask contains a mixture of sulphuric acid and potassium dichlarate.

Q. Then what is done?

A. That is tritrated back—These are standard solutions of known concentrations with an equivalent with the amount spent, we determine the amount of alcohol present in the particular specimen.

Q. Is this a standard proceedure, Doctor?

A. Yes sir.

Q. And is it generally recognized by the medical profes-ion as being accurate?

A. Yes sir.

Q. In December—On December the 30 of 1950, did Officer Muncy furnish you a blood specimen to make an analysis of?

A. He did.

Q. And did you make an analysis in the proceedure that you have outlined?

A. I have.

Q. And what did you determine as a result of your tests as to that blood sample furnished you by Officer Muney?

A. Well, we made a determination and had a result of, I don't recall, 17 or 18 hundredths percen' alcohol.

The Court: Did you make a report?

[62] A. I made a report, yes. I made a written report.

The Court: To whom did you make the written report?

A. I gave one to the State Police and I believe one went to the Sheriff's office.

By Mr. Reese:

Q. Now, Doctor, you testified at the Preliminary Hearing in this case?

A. Yes sir.

Q. To refresh your memory——

A. I believe I have a copy of it here. 17 hundredths percent.

Q. You are testifying from your notes?

A. From a copy of the report.

Q. And it was 17 hundredths alcoholic concentration.

A. That is correct.

Q. Is that by weight or by volume, Doctor, or both?

A. The analysis is made by volume, the calculations on the basis of weight, gravity.

Q. What, Doc*otr*, is the generally accepted figure as to the amount of alcohol a person can have in his blood stream and remain conscious?

A. Remain conscious, about—it would be 23 or 22 hundredths percent.

Q. And at what point or percentage is a man ordinarily under the influence of intoxicating liquors to any degree?

A. The figure so far as I know in a couple states is 15 hundredths percent.

Q. Is that the figure generally accepted by the profession and medical writers?

A. That is considered—that is right, 15 hundredths percent.

Q. And a person with 15 hundredths percent alcohol is [63] under the influence of intoxicating liquors to some degree?

A. That is right.

Q. From the specimen you examined, what is your opinion as to whether or not the person from whom that blood was taken was intoxicated?

A. Well, we presume that the man was intoxicated.

Mr. REESE: That is all.

CROSS EXAMINATION.

By Mr. WARDEN:

Q. Doctor, in making this laboratory test, how many samples of the blood specimen were used?

A. I did one.

Q. Just took one sample?

A. One sample.

Q. Is it not customary in making chemical analysises of specimens of body fluid to test it more than once or to test more than one sample to check against error?

A. Not necessarily.

Q. Is it customary?

A. No, it isn't necessarily.

Q. Is it done?

A. Once—on some things, yes.

Q. For what reason?

A. To eliminate the chance of error.

Q. No such precaution was taken in this instance, was it?

A. No sir, no.

Q. Does it sometimes happen that—I will withdraw that question. This test tube contained how many cubic centimeters of blood?

[64] A. I don't recall. I didn't measure it. I would estimate it, if I recall, 10 or 15 cc's, maybe 20.

Q. How many ccs did you use in making this test?

A. Two twentieths.

Q. Two twentieths. Is there any possibility that this—That would be a drop or two of blood, would it not?

A. That is all.

Q. Is it possible that the one or two drops of blood that you examined may have been or had a different alcoholic content than some of the other blood in this tube?

A. Not much chance, no.

Q. Well, what chance?

A. Well, I might answer it this way: In doing tests

previously over a period of time, we have rechecked ourselves and always got the same results.

Q. Does any possibility exist that different samples from this same test tube might show different results?

A. Not hardly.

Q. Some possibility however?

A. It would be most negligible.

Q. What precaution did you exercise to determine that each sample of blood would be exactly the same as any other sample taken from this test tube?

A. We just carefully mix it.

Q. In a test tube of this kind, a sample of this kind, if there was some alcohol in the blood, would the alcohol rise in the tube?

A. No, it is freely mixable.

[65] Q. You mean it remains——

A. It remains throughout, concentrated throughout.

Q. It doesn't rise or it doesn't descend?

A. It doesn't rise.

Q. In your previous examinations of persons suspected of being intoxicated where you have made blood tests, did you on those occasions have the opportunity not only to analyze the blood but to observe the appearance and physical action of the person?

A. It has been my experience to draw the sample myself and do the analysis likewise.

Q. I see. And have you ever testified in any other case where your testimony is restricted solely to a laboratory examination of a sample of blood and you had no opportunity to observe the individual?

A. I haven't.

Q. That is your first experience?

A. That is the first one that I haven't seen.

Q. Doctor, I will read from what—this is taken from Tests for Intoxication of the National Safety Council, Chemical Tests for Intoxication, showing the relationship between alcohol in the blood and the degree of intoxication, which states that where the blood, alcohol concentrate is between .05 percent and .15 percent, the existence of intoxication is questionable, but some persons may be under the influence of alcohol, and where the concentrate is more than .15 percent, every person is under the influence, the

degree of intoxication being expressed by the illustration thus: .15 percent to .20 percent alcohol in the [66] blood, dizzy and delerious; .20 percent to .30 percent, dazed and dejected; .30 to .40 percent, dead drunk; .40 percent to .50 percent, dead. Is that in conformity to your experience?

A. I don't know the particular age of the authority that is given there.

Q. That is 1940. I should have mentioned that.

A. My experience has been that a person is, the concentration lessor than that is given, he is, the patient is under greater influence or more drunk than the concentrations given there. In other words, the man at .25 is at a point of unconsciousness, twenty-three, four, five or six. They vary a little.

Q. Didn't you state in the preliminary hearing, Doctor, that in your opinion anybody was intoxicated who had more than .10 percent of one percent?

A. I don't recall.

Q. Is it not true, Doctor, that the tolerance to alcohol varies from one individual to another?

A. Very much so, yes.

Q. Let me read from a New York Statute providing for the admission of blood tests analysis in evidence, states that there was .05 of one percent or less by weight of alcohol in his blood was prima facie evidence that the defendant was not in an intoxicated condition. Would you agree with that?

A. I would.

Q. That the presence of more than .05 of one percent and less than .15 percent was relavent evidence but was not to [67] be given prima facie effect on the issue, that is the issue of intoxication. Does that sound correct to you?

A. That is right.

Q. And that evidence that at the time there was evidence of .15 percent or more by weight of alcohol in the blood may be admitted as prima facie evidence of intoxication. Does that sound right?

A. That sounds right.

Q. What are the factors which—What are the factors involved which result in a different tolerance by different persons with respect to the same amount of alcohol?

A. I can't hardly answer that. I don't feel like I can tell you the differences of activity of individuals under different amounts of alcohol.

Q. Well, let me ask you, then, would you say that a man in good health, thirty years of age, weighing 200 pounds and an 18 year old boy weighing 120 pounds would share the same tolerance towards alcohol?

A. No, they wouldn't.

Q. The older——

A. The heavier individual, yes, weight, size the possibility that an individual has eaten or not eaten makes a difference in intoxication.

Q. A person's general condition of health?

A. That may influence him too.

Q. Whether or not the person at the time was taking some medication such as one of the sulpha drugs?

A. That is right.

Q. That is one thing that has quite some effect; has it not?

[68] A. (Witness nods head)

Q. And the person's particular condition on the occasion.

Mr. Warden: I believe that is all.

Redirect Examination.

By Mr. Reese:

Q. Doctor, have you in your experience examined other persons in connection with your blood analysis who had approximately the same alcoholic content in their blood?

A. Yes sir, several.

Q. And what was your experience with them as to whether or not they were in your opinion under the influence of intoxicating liquor?

A. I have seen them where they were totery at less than .15 and I have seen them where they were rather steady at .16 .17 and .18 percent.

Q. Did you ever examine anyone in connection with your tests at .17 who in your opinion was in no degree under the influence of intoxicating liquor?

A. I always feel that—when they are up at .15, they show evidence of intoxication.

Q. Now, these tolerances that you have been questioned about and asked about, .05 to .15 and then .15 to .20, are based on the experience, national experience in blood tests, aren't they?

A. They are based on this particular method of blood testing.

Q. And in nation wide testing of this blood test?

A. Yes.

Mr. REESE: That is all

[69] RECROSS EXAMINATION.

By Mr. WARDEN:

Q. Is this particular blood test that you used, is that identified by any name or process?

A. Yes, it is known as the Woodmark Technique, modification of the Woodmark Technique.

Q. When was this perfected?

A. This was published in February, 1938.

Q. And you have based all your calculations and figures on this test published in 1938?

A. Yes.

Q. Would you say that it is possible for a person with .17 percent concentration of alcohol in the blood to be able to safely operate an automobile?

A. No.

Q. Could it be done?

A. Yes.

Q. It could be done?

A. Could be.

Mr. WARDEN: That is all.

REDIRECT EXAMINATION.

By Mr. REESE:

Q. Doctor, do you mean by that that a person with that alcoholic concentration could drive or could drive safely?

A. He could drive, but, providing everything was all right and nobody was in his way.

Mr. REESE: That is all.

RECROSS EXAMINATION.

By Mr. WARDEN:

Q. In other words, he might not be able to cope with an [70-77] emergency but so long as everything is smooth sailing, he can get by?

A. That is right, so long as there is nothing in the way, according to the authorities that made a substantial number of tests under these circumstances and made a publication of it. They state how much reaction time is diminished under certain concentrations and they tell you that even up at one tenth of one percent, .1 percent that an individual drives in what is known as channel driving. He is driving straight, too straight.

Q. But the possibility exists that a man with .17 percent could drive properly?

A. We have individuals that have driven under higher concentrations of alcohol but not safely.

Q. Well, have stayed out of trouble?

A. If he is out of trouble, he will drive.

The COURT: Thank you, Doctor.

[78-79] Dr. C. L. WOMACK, a witness called by the State, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. REESE:

[80] Q. Did you see the defendant brought into the hospital?

A. No, I did not. The first time I saw him, he was on the emergency table in the hospital.

Q. Did you see Officer Muncy there at the hospital at that time, Doctor?

A. Yes, he was there at the time.

Q. Did you withdraw a sample of blood at his request from the defendant?

A. Yes sir.

Mr. WARDEN: If the Court please, I would like to make a formal objection to any testimony along this line on the grounds previously stated with respect to the other Doc-

tor's testimony that this amounts to compelling the defendant to testify against himself.

The COURT: Same ruling. The objection was overruled.

[81] Supreme Court of the United States

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—April 23, 1956

On petition for writ of Certiorari to the Supreme Court of the State of New Mexico.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and the case is transferred to the appellate docket as No. 897.

April 23, 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 397291 226

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 4 1956
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 69

PAUL H. BREITHAUPT,

Petitioner,

vs.

MORRIS ABRAM,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR THE PETITIONER

F. GORDON SHERMACK,
112 West Palace Avenue,
Santa Fe, New Mexico,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Opinion below	1
Jurisdiction	1
Constitutional provisions, statutes and rules involved	2
Questions presented	2
Statement	2
Argument:	
I. The Fourteenth Amendment bars admission of evidence of results of a blood test made to determine alcoholic content in prosecution for involuntary manslaughter where the blood sample tested was taken from accused while unconscious	4
A. A conviction obtained by the use of evidence secured from an assault upon the person is obtained in violation of the Due Process Clause of the Fourteenth Amendment	4
B. The evidence in question was obtained by violation in principle of the Fourth and Fifth Amendments, and the circumstances of the case bring this violation within the dynamic of the Due Process Clause of the Fourteenth Amendment	11
II. The release of petitioner on parole during the pendency of the petition for Writ of Certiorari herein did not render this cause moot especially where petitioner was returned as a parole violator after the writ was granted and before briefs were filed or argument made	13
Conclusion	20
Appendix A	21
Appendix B	22

CITATIONS

Constitutional Provisions:

	Page
Fourth Amendment	11
Fifth Amendment	11
Fourteenth Amendment	11

CASES

Abie State Bank v. *Bryan*, 282 U.S. 765	13
Adamson v. *California*, 332 U. S. 46	11
Apadoca v. *State*, 140 Tex. Cr. 593, 146 S.W.2d 381	9
Bonahan v. *Nebraska*, 125 U. S. 692	16
Boyd v. *United States*, 116 U. S. 616	8
Breithaupt v. *Abram*, 58 N. M. 385, 271 P.2d 827	1
Eisler v. *United States*, 338 U. S. 189	16
Ex Parte Endo, 323 U. S. 283	15
Ex Parte Tom Tong, 108 U. S. 556	13
Ex Parte Vigil, 24 N. M. 640, 175 P. 713	17
Olmstead v. *United States*, 277 U.S. 438	11
People v. *Cahan*, 44 Cal.2d 434, 282 P.2d 905	9
People v. *Haesseler*, 41 Cal.2d 252, 260 P.2d 8	8
People v. *LeDoux*, 155 Cal. 535, 102 P. 517	9
People v. *Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383	9
Price v. *Johnson*, 334 U. S. 266	14
Rochin v. *California*, 342 U. S. 165	4, 7, 11
Sellers v. *Bridges*, 153 Fla. 586, 15 So. 2d 293	19
Smith v. *United States*, 94 U.S. 97	16
State v. *Barela*, 23 N. M. 394, 168 P. 545, L.R.A. 1918B 844	8
State v. *Berg*, 76 Ariz. 96, 259 P.2d 261	10
State v. *Dillon*, 34 N. M. 366, 281 P. 474	6, 8
State v. *Height*, 117 Iowa 650, 91 N. W. 935, 59 L.R.A. 437	9
State v. *Sisneros*, 42 N. M. 500, 82 P.2d 274	12
State v. *Weltha*, 228 Iowa 519, 292 N.W. 148	9
St. Pierre v. *United States*, 319 U. S. 38	14
Sunal v. *Large*, 332 U. S. 174	14
Trailmobile Co. v. *Whirls*, 331 U. S. 40	13

Page

Turvey v. *State*, 95 Okla. Cr. 418, 247 P.2d 304 10
United States v. *Smith*, 331 U. S. 469 14
United States ex rel. Innes v. *Crystal*, 319 U. S. 755 15
Weber v. *Squier, Warden*, 315 U.S. 810, No. 912 16
Weeks v. *United States*, 232 U. S. 383 8
Wolf v. *Colorado*, 338 U. S. 25 8, 11

State Constitutional Provisions and Statutes:

Art. II, § 10, New Mexico Constitution 8
Art. II, § 15, New Mexico Constitution 8
Art. II, § 18, New Mexico Constitution 8
§ 40-24-27, N. M. Stat. Anno. 1953 Comp. 12
§ 41-17-13, N. M. Stat. Anno. 1953 Comp. 18
§ 41-17-34, N. M. Stat. Anno. 1953 Comp. 18
§ 41-17-24, N. M. Stat. Anno. 1953 Comp. 18
§ 41-17-28, N. M. Stat. Anno. 1953 Comp. 18
§ 41-17-32, N. M. Stat. Anno. 1953 Comp. 19
§ 42-1706, N. M. Stat. Anno. 1941 Comp. 17
§ 42-1707, N. M. Stat. Anno. 1941 Comp. 17
§ 42-1709, N. M. Stat. Anno. 1941 Comp. 17
§ 42-1710, N. M. Stat. Anno. 1941 Comp. 17

Annotations and Texts:

25 A.L.R. 2d 1407 10
164 A.L.R. 967 10
159 A.L.R. 201 10
148 A.L.R. 1243 20
127 A.L.R. 201 10
32 C.J.S., Evidence, § 601 6
28 R.C.L., Witnesses § 20, p. 434 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 69

PAUL H. BREITHAUPT,

Petitioner,

vs.

MORRIS ABRAM,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of New Mexico (R. 5) is reported at 58 N. M. 385, 271 P. 2d 827.

Jurisdiction

The opinion of the Supreme Court of New Mexico became final on July 6, 1954 (Appendix B to Petition for Writ of Certiorari). The Petition for Writ of Certiorari was docketed on October 1, 1954. The jurisdiction of this Court rests on 28 U.S.C. 1257 (3).

Constitutional Provisions, Statutes and Rules Involved

Fourteenth Amendment (in pertinent part):

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Questions Presented

1. Whether the taking of a blood sample from petitioner while he was unconscious following an automobile accident and the admission of the results of such test as evidence of intoxication at the trial of the petitioner for involuntary manslaughter was a denial of due process of law under the Fourteenth Amendment.

2. Whether the release of petitioner on parole during the pendency of the Petition for Writ of Certiorari herein rendered the cause moot especially where petitioner was returned as a parole violator after the writ was granted and before briefs were filed or argument made.

Statement

On April 5, 1951, Petitioner was tried in the Fifth Judicial District Court of the State of New Mexico, convicted of the charge of involuntary manslaughter and sentenced to imprisonment in the state penitentiary of not less than six years nor more than ten years. (R. 2)

The charge was filed following the collision of a pickup truck driven by petitioner with another motor vehicle. The

collision resulted in the death of three persons, all of whom were riding in the automobile with which petitioner's truck collided.

Petitioner was taken to a hospital following the accident and there, while petitioner was unconscious (R. 6, 13, 14) a blood sample of about 20 c.c. was withdrawn by the doctor on duty at the direction of a state policeman. (R. 6, 13, 14, 23) Over the objection of counsel for petitioner, testimony concerning the taking of the sample and the results of test for alcoholic content was permitted at the trial. (R. 6, 12-24)

No appeal was taken from the conviction (R. 6). After intervening proceedings (Petition for Writ of Certiorari, p. 3) petitioner filed Petition for Writ of Habeas Corpus in the Supreme Court of the State of New Mexico on July 30, 1953 (R. 1), which court ordered issuance of the writ (R. 4).

Following issuance of the writ (R. 4), and the return (R. 4) the matter was heard by the New Mexico Supreme Court and an opinion entered on July 15, 1954, denying the petition for the writ (R. 5) became final on July 6, 1954 (Appendix B, Petition for Writ of Certiorari).

Petition for Writ of Certiorari was filed October 1, 1954, and granted April 23, 1956.

Petitioner was released on parole from the New Mexico Penitentiary on December 15, 1954 and was returned to custody under a warrant issued by the Parole Board of the State of New Mexico, dated June 11, 1956, meeting, the Parole Board revoked petitioner's parole as of February 11, 1955, being date of the occurrence of the first violation of parole. Appendix A, this brief.

Because of these circumstances, this Court has requested argument on the question of mootness of this proceeding in the briefs.

Heretofore, and by letter dated December 2, 1955, prior to the issuance of the Writ of Certiorari herein, in response to inquiry from the Clerk of this Court, petitioner's counsel and one of the counsel for respondent, joined in a letter addressed to the Clerk of this Court, stating it was their joint view the application for Writ of Certiorari was not rendered moot by virtue of the release of petitioner from the state penitentiary on parole. A copy of this letter is attached hereto as Appendix B.

ARGUMENT

I

The Fourteenth Amendment Bars Admission of Evidence of Results of a Blood Test Made to Determine Alcoholic Content in Prosecution for Involuntary Manslaughter Where the Blood Sample Tested Was Taken from Accused While Unconscious.

A. *A conviction obtained by the use of evidence secured from an assault upon the person is obtained in violation of the Due Process Clause of the Fourteenth Amendment.*

Petitioner contends the facts of the instant case bring it squarely under the rule announced in *Rochin* v. *California*, 342 U. S. 165, 173, that "convictions cannot be brought about by methods that offend a 'sense of justice'."

The method denounced in the Rochin decision was the illegal breaking into the privacy of the petitioner, in the forcible extraction of his stomach's contents.

The method employed in the instant case is likewise an illegal breaking into the privacy of petitioner, in the forcible extraction of his blood.

Rochin resisted the force employed upon him, though unsuccessfully; whereas petitioner was incapable of offering

any resistance, he being unconscious at the time the force was exercised.

This Court defined its function in reviewing challenges under the Due Process Clause and the meaning of that clause, as follows:

> . . . Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," . . . or are "implicit in the concept of ordered liberty." (p. 169)

The Due Process Clause does not spend itself in shielding the people from unlawful assault upon the person to obtain evidence of the commission of crime, it also serves as mandate that the fruits of such assault shall not be employed in procuring conviction. At page 172, 173 of the Rochin decision, it is said:

> It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. . . . They are only instances of the

> general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice." . . . It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.

This Court swept aside distinctions made between "real" and "verbal" evidence in performing its duty under the due process clause, saying to do otherwise would be to "ignore the reasons for excluding coerced confessions," which are obnoxious not only because of unreliability, but because they are achieved by means forbidden. If the distinction still has an vitality, it should not be applied in this case because the evidence objected to is *not* real evidence.[1]

Real evidence is defined:

> Demonstrative or real evidence is evidence addressed directly to the senses without the intervention of witnesses as by actual sight, hearing, or taste. (32 C.J.S. Evidence, §601)

---

[1] Apparently the New Mexico Supreme Court recognized the evidence in question was not "real" evidence, but refused to classify it as verbal, and upheld its admission under the statement: Compulsory or involuntary testimony from a defendant may and should be excluded but the rule in this jurisdiction has not been extended to cover real evidence or the case at hand." Opinion below, 58 N. M. 385, 391, 271 P. 2d 827.

It may be noted *State* v. *Dillon*, 34 N. M. 366, 281 P. 474, involved an attempt to suppress real or demonstrative evidence, certain liquors, seized under illegal search warrant, upon prosecution for keeping intoxicating liquor for sale. This is a typical example of "real" evidence, an article which shows the commission of the crime charged and is sufficiently identified and connected with accused and the crime charged.

But any evidence, verbal or real, should be excluded, where the conduct of the officers takes by force from an accused that which he has a right to keep secret, thereby crossing the borderline between procuring evidence and coercing confession of guilt. In 28 R.C.L. (Witnesses) §20, p. 434, it is said:

> The rights intended to be protected by the constitutional provision that no man accused of crime shall be compelled to be a witness against himself are so sacred, and the pressure toward their relaxation so great when the suspicion of guilt is strong and the evidence obscure, that it is the duty of courts liberally to construe the prohibition in favor of personal rights, and to refuse to permit any steps tending toward their invasion. Hence, there is the well-established doctrine that the constitutional inhibition is directed not merely to the giving of oral testimony, but embraces as well the furnishing of evidence by other means than by word of mouth, the divulging, in short, of any fact which the accused has a right to hold secret.

As if with foreknowledge of this very case, Mr. Justice Douglas declared in his concurring opinion in *Rochin*, 342 U. S. 177, 179.

> . . . Of course an accused can be compelled to be present at the trial, to stand, to sit, to turn this way or that, and to try on a cap or a coat. See Holt v. United States, 218 U. S. 245, 252, 253. But I think that words taken from his lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment.

Evidence obtained through violation of federal constitutional guaranties has been excluded in federal prosecutions since the decision in *Boyd* v. *United States*, 116 U. S. 616, and particularly since *Weeks* v. *United States*, 232 U. S. 383. This exclusionary rule has been rejected in numerous state cases, but has been followed in others, as is more particularly set out below. Reference is also made to *Wolf* v. *Colorado*, 338 U. S. 25, where the state cases are collected.

New Mexico rejected the doctrine of the *Weeks* case in the case of *State* v. *Dillon*, 34 N. M. 366, 281 P. 474, despite the fact the New Mexico Constitution contains provisions which are, for present purposes, identical with the Fourth, Fifth, and Fourteenth Amendments.[2] The New Mexico Supreme Court discussed and quoted the *Rochin* case, *supra*, and the two New Mexico decisions dealing with the matter of admission of evidence obtained in violation of the defendant's constitutional rights, *State* v. *Barela*, 23 N. M. 395, 168 P. 545, L.R.A. 1918B 844,[3] and *State* v. *Dillon*,[4] *supra*.

In its determination of the effect of the *Rochin* case the New Mexico Court quoted extensively from the California case, *People* v. *Haeussler*, 41 Cal. 2d 252, 260 P. 2d 8, which

---

[2] "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, . . ." (New Mexico Constitution, Art. II, § 10)

"No person shall be compelled to testify against himself in a criminal proceeding . . ." (New Mexico Constitution, Art. II, § 15)

"No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws." (New Mexico Constitution, Art. II, § 18)

[3] The court held in a prosecution for arson that evidence of the correspondence of the tracks of the accused made under compulsion of the sheriff with those found at the scene of alleged crime and leading therefrom and evidence of the fitting of the shoes of the accused taken from them by the sheriff into tracks found at scene of crime was not inadmissible as violative of the constitutional guaranty against compulsory self-inerimination.

[4] Discussed *supra*, footnote 1.

dealt with a factual situation very nearly identical with that here present, wherein the California court distinguished the situation from that in the *Rochin* case with which distinction the New Mexico court agreed.

Subsequent to the decision of the New Mexico court, the California Supreme Court in *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, ruled that evidence obtained in violation of the constitutional guaranties was inadmissible and specifically overruled its prior decisions in *People* v. *LeDoux*, 155 Cal. 535, 102 P. 517; *People* v. *Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, and the cases based thereon, stating:

> We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. (282 P. 2d at 911).

The Iowa Supreme Court in a situation identical with that in the now overruled *Haeussler* case, *supra*, and the present case, followed the exclusionary rule in *State* v. *Weltha*, 228 Iowa 519, 292 N.W. 148. See also *State* v. *Height*, 117 Iowa 650, 91 N.W. 935, 59 L.R.A. 437.

The Texas Court of Criminal Appeals in *Apodaca* v. *State*, 140 Tex. Cr. 593, 146 S.W. 2d 381, held that compelling the accused to submit to certain tests and to give a urine specimen required the exclusion of testimony as to such tests and the conclusion that the accused was intoxicated because of the violation of the state constitutional provision against self incrimination.

In a decision in which evidence of results of a drunkometer test was declared admissible, the Arizona Supreme

Court in *State* v. *Berg*, 76 Ariz. 96, 259 P. 2d 261, 266, declared:

> We can see no legal difference in the right to a specimen of defendant's breath to be used as evidence in cases of drunk driving *where the body of the person is neither invaded nor assaulted* and the right to search his person and premises and seizing such physical evidence as deemed necessary to procure a conviction of the crime for which he was arrested. We have read the case of Rochin v. People of the State of California (cited supra) cited by defendant and find no similarity whatever in that case to the case at bar . . . . The conviction in that case reversed on the ground that it violated the due process clause of the 14th Amendment to the Constitution of the United States. *Neither is there any similarity in the instant case to cases cited relating to the taking of blood tests of a defendant which is accomplished by withdrawing blood from the veins of the body through the medium of a needle constructed for that purpose* . . . (Emphasis supplied)

The Oklahoma Court of Criminal Appeals in *Turvey* v. *State*, 95 Okla. Cr. 418, 247 P. 2d 304, 307, cited the *Apodaca* case, *supra*, stating, "The Court should not admit evidence of defendant's intoxication where such tests were given over objection of the accused."

See Annotations in 25 A.L.R. 2d 1407, at 1412, and 164 A.L.R. 967, dealing with requiring submission to physical examination or tests as violation of constitutional rights. See also Annotations in 127 A.L.R. 1513 and 159 A.L.R. 201, on admissibility of evidence based on scientific tests for intoxication.

B. *The evidence in question was obtained by violation in prinaiple of the Fourth and Fifth Amendments, and the circumstances of the case bring this violation within the dynamic of the Due Process Clause of the Fourteenth Amendment.*

In previous decisions, some members of this Court have shown concern as to whether evidence obtained by State officers was in fact obtained in violation of the concepts housed in the Fourth and Fifth Amendments, protection against unreasonable search and seizure and the privilege against self-incrimination.[5]

While petitioner does not challenge the long array of decisions of this Court that the first ten amendments to the United States Constitution were not extended to the States under the Fourteenth Amendment, he does rely upon the "generative principles" set forth in the Bill of Rights to the extent that these principles need to be considered by this Court in determining whether petitioner's conviction offends against the Due Process Clause of the Fourteenth Amendment.

It is therefore submitted that petitioner's conviction was based upon evidence obtained by unreasonable search and seizure. The invasion of petitioner's person was made under no authority of law or precedent whatsoever, and it is difficult to imagine any search and seizure which could be more unreasonable. If the house and papers of an accused

---

[5] *Rochin* v. *California*, 342 U. S. 165, concurring opinions of Mr. Justice Black, 174, and Mr. Justice Douglas, 177. *Wolf* v. *Colorado*, 338 U. S. 25, concurring opinion of Mr. Justice Black, 39; dissenting opinion of Mr. Justice Douglas, 40; Dissenting opinion of Mr. Justice Murphy, 41; dissenting opinion of Mr. Justice Rutledge, 47. *Adamson* v. *California*, 332 U. S. 46, dissenting opinions of Mr. Justice Black, 68, and Mr. Justice Murphy, 123. Compare, *Olmstead* v. *United States*, 277 U. S. 438, dissenting opinions of Mr. Justice Holmes, 469, and Mr. Justice Brandeis, 471.

are guarded against unauthorized and unreasonable search and seizure, then the intrusion into his person when he is unconscious must certainly have no sanction, or the rights of individuals under a state of civilization will be sadly, if not fatally, damaged.

It is further submitted that petitioner's conviction was based upon evidence secured from him against his will (he being unconscious) and used over his objection, and he was thereby compelled to testify against himself, upon prosecution for the crime of involuntary manslaughter under § 40-24-7, N.M.S.A., 1953 Compilation, which provides:

> "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: 1st. Voluntary: Upon a sudden quarrel or in the heat of passion. 2nd. Involuntary: In the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection.

It was held in *State* v. *Sisneros*, 42 N.M. 500, 82 P. 2d 274, the act of an intoxicated person in driving an automobile recklessly may be such criminal negligence as would warrant a finding of manslaughter if such operation of the automobile was the proximate cause of death.

Regardless of the guilt or innocence of petitioner of the crime charged, it could not be demanded of him that he tell the jury he was intoxicated. How then may evidence of the results of a test upon his blood taken from him by invasion of the body while he was unconscious and to the use of which he objected fully thereafter be held anything other than compulsory self-incrimination? Petitioner submits the use of such evidence under the circumstances of this case was the very gist of self-incrimination—for all practical purposes, a confession of guilt unlawfully demanded and taken from an accused.

II

The Release of Petitioner on Parole During the Pendency of the Petition for Writ of Certiorari Herein Did Not Render This Cause Moot Especially Where Petitioner Was Returned as a Parole Violator After the Writ Was Granted and Before Briefs Were Filed or Argument Made.

The nature of the remedy of the writ of habeas corpus is set forth in *Ex Parte Tom Tong*, 108 U. S. 556, 559, 560:

> The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not in inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act . . . petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process . . .

It is submitted that in general a change of circumstances, whether by act of parties, or a change in statutory law, or by the mere lapse of time, will not render a case moot so long as there still remains a justiciable controversy and power of the tribunal to grant appropriate relief. *Trailmobile Co.* v. *Whirls*, 331 U. S. 40; *Fiswick* v. *United States*, 329 U. S. 211; *Factor* v. *Laubenheimer*, 290 U. S. 276; and *Abie State Bank* v. *Bryan*, 282 U. S. 765.

Thus in *Fiswick* v. *United States, supra,* this Court reviewed petitioner's conviction for conspiring to file false registration statement under the Alien Registration Act and to conceal his membership in the Nazi party, against the suggestion that the cause had become moot by virtue of the fact petitioner had already served the sentence imposed upon him under such conviction, because of the considerations that a conviction might weaken his defense to a deportation proceeding, impair his chances of naturalization and subject him to the loss of certain civil rights. The Court said: ". . . Fiswick has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed upon him. In no practical sense, therefore, can Fiswick's case be said to be moot." (P. 222) [6]

Similarly it was held in *Factor* v. *Laubenheimer, supra,* that a proceeding in habeas corpus was not moot and did not abate where the extradition treaty under which arrest was had was supplanted by a new treaty under which the obligation to surrender petitioner to the foreign authority was continued without change in substance.

It is further submitted, as a general proposition, that whether or not a case is moot is a question to be determined by consideration of the facts existing at the time the inquiry is made. (See authorities cited *supra,* this point.)

The scope of relief sought by petitioner in the instant case is his release from confinement under a conviction obtained in violation of the due process clause. The controversy is a justiciable one. *United States* v. *Smith,* 331 U. S. 469; *Sunal* v. *Large,* 332 U. S. 174; *Price* v. *Johnson,* 334 U. S. 266; and *Hawk* v. *Olson,* 326 U. S. 271. Therefore the question remains, can this Court, by its direction to the Supreme

---

[6] The case of *St. Pierre* v. *United States,* 319 U. S. 38, was distinguished on the ground petitioner there had not shown he would be subject to any further penalties on the ground of a judgment for contempt fully satisfied by service of term of imprisonment.

Court of the State of New Mexico, make effective any decision it might render as to such controversy. Petitioner submits his release from confinement can unquestionably be accomplished through service of the Writ of Habeas Corpus upon the respondent, if it be determined petitioner should prevail in his contention on the merits. On the other hand, if the case should be decided against him, petitioner will continue in the New Mexico Penitentiary serving the balance of his unexpired term on the conviction he challenges. The fact that he was released on parole for an interval after the filing of his Petition for Writ of Certiorari can hardly mitigate against the fact that he was convicted of the crime of involuntary manslaughter, sentenced to a term of imprisonment in the state penitentiary, and is now confined in that institution serving the balance of his unexpired term.

No case has been found where the question of mootness has been considered under identical circumstances. However, the case of *Ex Parte Endo*, 323 U. S. 283, does bear similarity to the instant case. There a loyal American citizen of Japanese ancestry was placed in a War Relocation Center. She was denied a Writ of Habeas Corpus by the United States District Court for the Northern District of California. Pending appeal from such denial, she was transferred to another relocation center in another judicial circuit. Question arose as to whether the case became moot. The Court noted the Acting Secretary of the Interior had advised if the writ were served on the Secretary or any official of the War Relocation Authority, one such official being in the judicial district where the case arose, the petitioner would be produced and the order complied with. After distinguishing *United States ex rel. Innes* v. *Crystal*, 319 U. S. 755, wherein writ of habeas corpus was sought for a member of the military who was later removed to a fed-

eral penitentiary in a different district and circuit, the Court held the case was not moot, saying:

> . . . the District Court acquired jurisdiction in this case and that the removal of (petitioner) did not cause it to lose jurisdiction where a person in whose custody she is remains within the district. . . . we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner. (p. 306)

After noting the statutory jurisdiction of federal district courts to grant writs of habeas corpus for the purpose of inquiry into the cause of restraint of liberty, the Court ruled:

> . . . That end may be served and the decree of the court made effective if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was begun.

Another line of authority to be noted does not deal with habeas corpus proceedings, but is illustrative of inquiry into the question of mootness. These cases involved the circumstance of a petitioner securing the grant of review of his conviction and then escaping from custody before decision upon review. In three instances this Court has followed the practice of ordering the case removed from the docket until further order, pending return of the fugitive. *Eisler* v. *United States*, 338 U. S. 189; *Bonahan* v. *Nebraska*, 125 U. S. 692; *Smith* v. *United States*, 94 U. S. 97.

Petitioner has not overlooked this Court's decision denying a petition for writ of certiorari in *Weber* v. *Squier, Warden*, 315 U. S. 810, No. 912, on the ground the cause was moot, "it appearing that petitioner has been released upon

order of the United States Board of Parole and that he is no longer in the respondent's custody."

Petitioner believes this ruling is not controlling in the present case for the reason that he is presently in the custody of respondent. Furthermore, as the denial of certiorari in *Weber* v. *Squier, Warden,* does not consider under what terms, if any, parole was made, or the situation with respect to constructive, as distinguished from actual custody, petitioner believes the question of mootness regarding the present application is still an open one.

It is submitted that the return of petitioner to actual custody of respondent makes a ruling on the effect of the granting of parole in this regard unnecessary. However, in order to make full exposition of petitioner's case, following paragraphs are descriptive of the effect of parole in New Mexico.

At the time of petitioner's conviction and commitment, the New Mexico statutes on parole were §§ 42-1706, 42-1707, 42-1709, and 42-1710, New Mexico Statutes Annotated, 1941 Compilation. The New Mexico Supreme Court interpreted § 42-1706,[7] in Ex Parte Vigil, 24 N.M. 640, 175 P. 713, as empowering the Superintendent to retake and reimprison any inmate on parole when in his judgment the terms of the

---

[7] "The said prison board shall have power to establish rules and regulations under which prisoners within the penitentiary may be allowed to go upon parole outside the penitentiary building and enclosure (one of which shall be the total abstinence from alcoholic liquors as a beverage), after having served the minimum term of his sentence, but to remain while on parole in the legal custody and under the control of the prison board and subject at any time to be taken back within the enclosure of said penitentiary; and full power to enforce such rules and regulations and to retake and reimprison any inmate so upon parole is hereby conferred upon the superintendent, whose order, certified by the clerks of the prison, with the seal of the penitentiary attached thereto, shall be a sufficient warrant for all officers named therein to authorize such officers to return to actual custody any conditionally released or paroled prisoners. . . ."

parole agreement had been violated, and that such action by the Superintendent was not reviewable. The court stated:

> . . . Under the statute the paroled convict is at all times in the legal custody and under the control of the prison board, and subject at any time to be taken back within the inclosure of said penitentiary. Being thus at all times in the constructive custody of the prison board, the paroled convict is no more entitled to a hearing in the courts as to whether or not he has violated the terms of his parole agreement than he would be if he were a "trusty" employed temporarily outside the penitentiary on road work or in some other service for the state." (175 P. 713, 714)

Subsequent to petitioner's commitment to the penitentiary, the New Mexico Legislature enacted the Parole Act of 1955 (§§ 41-17-13 to 41-17-34, New Mexico Statutes Annotated, 1953 Compilation, 1955 Pocket Supplement), which Act became effective March 26, 1955, and repealed the prior sanctions on parole.

Section 41-17-24, *supra*, provides in pertinent part: " . . . every prisoner while on parole shall remain in the legal custody of the institution from which he was released but shall be subject to the orders of the board . . ."

Section 41-17-28, *supra*, provides in pertinent part: "At any time during release on parole the board may issue a warrant for the arrest of the released prisoner for violation of any of the conditions of the release, or a notice to appear to answer to a charge of violation. Such notice shall be served personally upon the prisoner. The warrant shall authorize the superintendent of the correctional institution from which the prisoner was released to return such prisoner to the actual custody of the institution or to

any other suitable detention facility designated by the board; if the prisoner is out-of-state, the warrant shall authorize the superintendent to return him to the state . . . ."

Section 41-17-32, *supra*, provides "The provisions of this act are hereby extended to all persons who, at the effective date thereof, may be on parole, or eligible to be placed on parole under existing laws, with the same force and effect as if this act had been in operation at the time such persons were placed on parole or became eligible to be placed thereon, as the case may be."

It is submitted that under the situation here present both the old and new parole acts of New Mexico provided that a parolee remained in legal custody and therefore the parole itself did not render this controversy moot.

It is petitioner's contention that at all times since his conviction and commitment he has been under legal custody, either actual or constructive. As noted at the beginning of this argument, the petition for a writ of habeas corpus is a civil action brought to regain liberty. It cannot realistically be argued that a prisoner on parole is at liberty. When considering this exact question, the Supreme Court of Florida held in *Sellers* v. *Bridges*, 153 Fla. 586, 15 So. 2d 293, 148 A.L.R. 1240, that petitioner is at large as a parolee upon terms and conditions imposed by the parole commission restricting his fundamental liberties and privileges does not deprive him of remedy by habeas corpus on the ground that the commitment for imprisonment was void. The Florida Court reasoned:

> Parole is that procedure by which a prisoner who must in any event be returned to society at some time in the future is allowed to serve the last portion of his sentence outside prison walls and under strict supervision, as preparation for his eventual return to society.

After noting Florida parole procedure, the court continued:

Parole, therefore, is not an act of amnesty or forgiveness —as some suppose. It does not put an end to sentence legally imposed. Rather, it is a continuation of sentence. (15 So. 2d 293, 295) See also annotation following report of this case in 148 A.L.R. at p. 1243.

Conclusion

The judgment of the Supreme Court of the State of New Mexico is in error and should be reversed and the case remanded with directions to issue its Writ of Habeas Corpus to respondent to release petitioner.

Respectfully submitted,

F. Gordon Shermack,
142 West Palace Avenue,
Santa Fe, New Mexico,
Counsel for Petitioner.

APPENDIX A

State of New Mexico

BOARD OF PAROLE

P. O. Box 1219
Santa Fe, N. M.
Telephone: 3-7592
Wm. J. Cooper,
Director of Parole,
Interstate Compact Administrator

October 2, 1956.

Mr. Gordon F. Shermack
Attorney at Law
Bokum Building
Santa Fe, New Mexico

Re: Breithaupt, Paul
NMSP # 13633

Dear Mr. Shermack:

In compliance with your telephonic request of this date, we are hereby advising you that the above named subject was paroled from the Penitentiary of New Mexico effective December 15, 1954, with a termination date of June 29, 1957. This is the information contained on his parole agreement signed by him on December 16, 1954. Other records in our files indicate that his maximum expiration date is July 9, 1957. This subject had been under parole supervision in California under the terms of the Interstate Compact for supervision of parolees and probationers and the records show that he had given the California Parole Authorities a great deal of trouble throughout. At the meeting of the

Parole Board on August 13, 1956, Mr. Breithaupt's parole was revoked effective February 1, 1955 with his new commitment time to begin as of July 17, 1956.

Yours very truly,

WM. J. COOPER,
Director of Parole.

WJC/acs.

APPENDIX B

December 2, 1955.

Harold B. Willey, Clerk
Supreme Court of the United States
Washington 13, D. C.

Re: Paul H. Breithaupt v. Abram, No. 6 Misc., Oct. Term, 1955, Formerly No. 234 Misc., Oct. Term, 1954

Dear Sir:

Your letters of November 17, 1955, concerning the above matter have been received and are being jointly answered by counsel for both parties.

The petitioner is still on parole, which situation is due to continue until his final discharge date sometime in 1957.

Both of us are of the feeling that the fact of petitioner's status as a parolee does not make the above cause moot. Chapter 232, Laws of 1955.

A similar statute has been construed by the Supreme Court of New Mexico in Ex parte Vigil, 24 N. M. 640, 175 P. 713, to vest absolute discretion in a superintendent of the penitentiary to retake and reimprison any convict on parole in the exercise of his sole discretion. As may be seen from the wording of the statute, the convict remains in the legal

custody and under the control of the prison board during the time he is on parole.

We are advised that at the present time there are no proceedings pending to bring about the reconfinement of petitioner and that proceedings which had formerly been instituted for that purpose have been dropped.

Counsel for petitioner has written petitioner to ascertain his desires with regard to further prosecution of his case. We will advise you promptly as soon as a reply has been received from petitioner.

We trust that the foregoing will be of some assistance to the Court in its disposition of the above matter.

Very truly yours,

F. GORDON SHERMACK,
One of the Attorneys for the Petitioner.
WALTER R. KEGEL,
Assistant Attorney General,
One of the Attorneys for Respondent.

LIBRARY
SUPREME COURT, U.S.

FILED
NOV 13 1956
JOHN T. FEY, Clerk

BRIEF FOR THE RESPONDENTS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956.

No. 69

PAUL H. BREITHAUPT, PETITIONER,

vs.

MORRIS ABRAM, RESPONDENT.

On Writ of Certiorari To The Supreme Court of The State of New Mexico

DEAN S. ZINN,
407 Don Gaspar Avenue,
Santa Fe, New Mexico,
RICHARD H. ROBINSON,
Attorney General of the
State of New Mexico,
WALTER R. KEGEL,
Assistant Attorney General of the
State of New Mexico,
PAUL L. BILLHYMER,
Assistant Attorney General of the
State of New Mexico,
Attorneys for Respondent.

EASTWOOD PRINTING CO., 2031 CURTIS STREET, DENVER

SUBJECT INDEX

	PAGE
Statement	1
Argument:	
I. The Fourteenth Amendment does not bar the use of the result of blood test made to determine alocholic content in a trial for involuntary manslaughter when blood sample tested was taken from accused while unconscious	2
II.	11
Conclusion	12

TABLE OF AUTHORITIES CITED

CASES

Adamson v. Calif., 332 U.S. 46	6, 9
Apodaca v. State, 140 Tex. Cr. 593, 146 SW 2d 381	7
Hicks and Bovey v. State, 93 N.Y.S. 2d 560 (Ct. of Claims N.Y.)	4
Irvine v. Calif., 347 U.S. 128	6, 8
Jacobson v. Mass., 197 U.S. 11	5
Kerschwing v. Farrar, 114 Colo. 421, 166 P. 2d 154	4
People v. Block, 125 Colo. 36, 240 P. 2d 512, Cert. Den. 343 U.S. 978	4, 11
People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905	6, 7
People v. Haeussler, 41 Cal. 2d 252, 260 P. 2d 8, Cert. Den. 347 U.S. 931	3, 4, 6, 7
People v. Tucker, 88 Cal. App. 2d 333, 198 P. 2d 941	4
People v. Woods, Cal. 2d, 293 P. 2d 901	7

PAGES

Rochin v. Calif., 342 U.S. 165 ..... 2, 3, 4, 6, 7, 8, 9, 11

State v. Alexander, 7 N.J. 585, 83 A. 2d 441 11

State v. Ayres, 70 Idaho 18, 211 P. 2d 1942 ..... 4, 11

State v. Barela, 23 N.M. 394, 168 P. 545, L.R.A. 1918 B 844 ..... 5, 8

State v. Cash, 219 N.C. 818, 15 SE 2d 277 11

State v. Cram, 176 Ore. 577, 160 P. 2d 283, 164 A. L.R. 952 ..... 4, 11

State v. Dillon, 34 N.M. 366, 281 P. 474 ..... 5, 8

State v. Height, 117 Iowa 650, 91 NW 935, 59 A.L.R. 437 7

State v. Sturtevant, 96 N.H. 99, 70 A. 2d 909 11

State v. Weltha, 228 Iowa 519, 292 NW 148 7

Turvey v. State, 95 Okla. Cr. 418, 247 P. 2d 304 8

Twining v. New Jersey, 211 U.S. 78 ..... 6, 9

U. S. v. Holt, 218 U.S. 245 10

U. S. v. Williamson, 4 U.S.C.M.A. 320 11

Weeks v. U.S., 232 U.S. 383 ..... 5, 6

Wolf v. Colo., 338 U.S. 25 ..... 6, 8

CONSTITUTIONS

United States Constitution:

Fourth Amendment 8

Fifth Amendment 8

Fourteenth Amendment 5, 6, 8, 11

TEXTS

	PAGES
American Law Institute's Model Code of Evidence (1942):	
Rule 203	10, 11
Rule 205	10
22 A.L.R. 1189	5
41 Cal. Law Rev. 728	4
Inbau, Self Incrimination	9
34 Minn. L. Rev. 1	9
Wigmore, Evidence, 3d Ed., Vol. III, p. 362, §2263	9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956.

No. 69

PAUL H. BREITHAUPT, PETITIONER,

VS.

MORRIS ABRAM, RESPONDENT.

On Writ of Certiorari To The Supreme Court of The State of New Mexico

---

BRIEF FOR THE RESPONDENTS

STATEMENT

The Respondent has no objection to the Petitioner's statement of "Opinion Below", "Jurisdiction", "Constitutional Provisions, Statutes and Rules Involved", "Questions Presented", and "Statement".

ARGUMENT

I.

The Fourteenth Amendment does not bar the use of the result of blood test made to determine alcoholic content in a trial for Involuntary Manslaughter when blood sample tested was taken from accused while unconscious.

In subpoint A of Point I, Petitioner relies upon *Rochin vs. California*, 342 U.S. 165, claiming that this case announces the rule that "a conviction obtained by the use of evidence secured from an assault upon the person is obtained in violation of the Due Process Clause of the Fourteenth Amendment."

The Respondent in this case believes that no such ruling was intended by the *Rochin* case. In fact, we submit that the key to the understanding of this decision rests in the following language:

> "*On the facts of this case* the conviction of the petitioner has been obtained *by methods* that offend the Due Process Clause." (p. 174). (Emphasis supplied.)

When this statement is considered with the facts of the *Rochin* case, it becomes apparent that it was not just the one element of breaking into the privacy of the Petitioner. It was the overall brutality of the police officers in the *Rochin* case, which offended the "sense of justice" which is a part of Due Process. In the *Rochin* case, there was the illegal entry into the home, together with the "jumping on" the defendant when he put the capsules in his mouth to prevent the loss of the capsules. When this proved unsuccessful, the defendant was handcuffed and taken to the hospital where his stomach was pumped. Clearly, these are the facts which offended the "sense of justice." It

was the totality of the brutality of this case which is shocking and offensive.

The Petitioner attempts to bring his fact situation within the *Rochin* facts; however, even a casual examination of the facts, as outlined at pp. 2-4 of Petitioner's Brief, discloses that in the case at bar there is no element of brutality as in the *Rochin* case. In this case, there is no illegal entry into the home of the Petitioner. There is no brutal assault upon his person. All that was done was 20 cc. of blood was withdrawn by a doctor. (R. 6, 13-14, 23.) The Respondent submits that all of these facts do not disclose any situation such as in the *Rochin* case to indicate that "the conviction of the Petitioner has been obtained by methods that offend the Due Process Clause."

The Respondent believes that this Court, at p. 174 of the *Rochin* decision, excluded blood tests and similar techniques from its ruling by the following language:

> "We, therefore, put to one side cases which have arisen in State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book: *It does not fairly* represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record."

It is to be noted that this Court refused to condemn these types of cases because they do not have the element of "brutal" force about them which is repulsive to the requirements of the Due Process Clause.

This is the construction which the California Court placed on the *Rochin* case in the case of *People vs. Haeussler*, 41 Cal. 2d 252, 260 P. 2d 8, cert. den. 347 U.S. 931. The facts in the *Haeussler* case were identical to the case

at bar and the California Court did not find that the act of taking the blood in the usual manner so brutal and shocking as to warrant the application of the *Rochin* doctrine. This California case was influential in the decision of the New Mexico Supreme Court below. (R. 9, 19, 11.) For a review of the various constructions that state courts have placed upon the *Rochin* case, see 41 *Cal. Law Rev.* 728.

The position of the Respondent in this case is that it is not uncivilized conduct to withdraw blood for a scientific test to determine the alcoholic content of blood of the Petitioner. It did not violate any of the fundamental concepts of the "community's sense of fair play and decency." It did not offend the sense of fair play and decency of the Justices of the Supreme Court of New Mexico in the case below, where the same issues were raised. (R. 5-12, inclusive.) The same type of conduct was not offensive to five of the California Justices in *People vs. Haeussler*, supra. Several other state courts have approved the withdrawal of blood samples from an accused while he was unconscious and unable to consent. *State vs. Cram*, 176 Ore. 577, 160 P. 2d 283, 164 A.L.R. 952; *Kerschbing vs. Farrar*, 114 Colo. 421, 166 P. 2d 154; *People vs. Tucker*, 88 Cal. App. 2d 333, 198 P. 2d 941; *State vs. Ayres*, 70 Idaho 18, 211 P. 2d 1942; *Hicks and Bovey vs. State*, 93 N.Y.S. 2d 560 (Ct. of Claims N.Y.); *People vs. Block*, 125 Colo. 36, 240 P. 2d 512, cert. den. 343 U.S. 978.

Another test which can be applied to determine whether the extraction of blood sample is shockingly brutal is whether the State Legislature, under its police powers, could validly require by legislation a blood test for all persons arrested for drunk driving. The validity of such a requirement would hardly be open to question. Analogous legislation has been passed under the authority

of the police power by various states. Examples are compulsory vaccination (Jacobsen vs. Mass., 197 U.S. 11); blood test prior to marriage; blood test for pregnant women; and test for venereal diseases (22 A.L.R. 1189). These statutes would indicate that these requirements are not unreasonable. It would seem clear that a state could require submission to blood tests upon arrest for drunk driving under the police power. If the legislature is so empowered, police officers have an implied power to take such samples, or at least the taking of such sample by an officer is not shockingly brutal so as to be interdicted by the *Rochin* case.

In the sanction of this activity, the New Mexico Supreme Court in no way afforded "brutality the cloak of law." The sanction of this evidence does not tend "to discredit the law." In fact, the use of this type of evidence tends to uphold the law inasmuch as it provided an accurate means of determination of a fact. The test is an aid to determining innocence as well as in determining guilt. In view of the highway slaughter and the facts that drinking drivers are a menace to highway safety, it seems that civilized society requires that scientific tests be used in any case where such will aid in the "discovering [of] wrongdoers and bringing them to book." Certainly the method of securing evidence is an important consideration and brutal shocking methods should not be sanctioned. However, this case is not one that was brutal and shocking in its method.

The Petitioner concedes that New Mexico has rejected the exclusionary rule of *Weeks vs. United States*, 232 U.S. 383, in the cases of *State vs. Barela*, 23 N.M. 394, 168 P. 545, L.R.A. 1918-B 844, and *State vs. Dillon*, 34 N.M. 366, 281 P. 474. At this date, it surely cannot be claimed that the Fourteenth Amendment requires that a state in every

case exclude evidence which is obtained in violation of some constitutional right. *Wolf vs. Colo.*, 338 U.S. 25, clearly settled the fact that the Federal evidence exclusionary rule of the *Weeks* case, supra, was nothing more than a federal rule of evidence which was not binding upon the States. This is particularly true where the claim is such that the evidence is secured in violation of the prohibition against unreasonable search and seizure. This position was affirmed in *Irvine vs. Calif.*, 347 U.S. 128.

It is likewise settled that the Fourteenth Amendment does not include the privilege against self-incrimination. *Twining v. New Jersey*, 211 U.S. 78; *Adamson v. Calif.*, 332 U.S. 46. It is therefore clear that the fact that New Mexico rejects the rule of the *Weeks Case*, supra, does not of itself violate any right of the Petitioner under the Fourteenth Amendment.

The Petitioner seeks to discredit the decision of the Supreme Court of New Mexico in this case by pointing out that this decision accepted the argument which the California Court used in *People v. Haussler*, supra, in distinguishing the fact situation there and here presented from the facts of the *Rochin Case* and then claiming that subsequently the California Court overruled the *Haeussler Case*, supra, in the case of *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905. Actually the California Court in the *Cahan Case*, supra, carefully points out that it is adopting a rule of evidence by the following language:

> "It bears emphasis that in the absence of a holding by the United States Supreme Court that the Due Process Clause requires exclusion of unconstitutionally obtained evidence, whatever rule we adopt, whether it excludes or admits the evidence, will be a judicially declared rule of evidence." (282 P. 2d at 910.)

The *Cahan Case*, supra, in no way overruled the *Haeussler Case*, supra, so far as the *Haeussler Case* distinguished its fact situation from the *Rochin's* facts. In fact, the *Cahan Case*, supra, emphasized the *Haeussler* analysis of the *Rochin* decision in the following language:

> "If the unconstitutional conduct of the law enforcement officers were more flagrant or more closely connected with the conduct of the trial, it is clear that the foregoing principles would compel the reversal of any conviction based thereon. Thus, no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official of otherwise, that would have that effect would not be tolerated. Similarly, he may not be convicted on the basis of evidence obtained by the use of the rack or the screw or other brutal means no matter how reliable the evidence obtained may be." (282 P., 2d 912).

It is clear that all that the *Cahan Case*, supra, did was announce a new rule of evidence for the California Courts, and it overruled the *Haeussler Case*, supra, only to the extent that it was based upon the former rule followed in California.

The analysis which the *Haeussler Case* made of the *Rochin Case* is still followed in the California Courts. *People v. Woods*, ...Cal. 2d....., 293 P. 2d 901.

The Respondent submits that the distinction made by the *Haeussler Case* of the *Rochin Case* and accepted by the New Mexico Court is a valid factual distinction and it was in no way impaired by the ruling in the *Cahan Case*.

The Petitioner seeks additional comfort from the cases of *State v. Weltha*, 228 Iowa 519, 292 NW 148; *State v. Height*, 117 Iowa 650, 91 NW 935, 59 A.L.R. 427; *Apodaca*

v. State, 140 Tex. Cr. 593, 146 SW 2d 381; *Turvey v. State*, 95 Okla. Cr. 418, 247 P. 2d 304. These cases merely are examples of the exclusionary rule. They would perhaps be persuasive if the issue before the court was what evidentiary rule should be adopted. However, New Mexico had settled this question in the cases of *State v. Barela*, supra, and *State v. Dillon*, supra, and New Mexico has decided that it would not exclude evidence on the grounds that it was obtained in violation of a constitutional guaranty. The Due Process Clause of the Fourteenth Amendment does not preclude the State of New Mexico from adopting such rule of evidence. *Wolf v. Colorado*, supra. Due Process of the Fourteenth Amendment case only applies if the Petitioner can bring his case within the *Rochin* rule, and the Respondent submits that as heretofore pointed out the facts in the present case do not bring it within the rule announced in the *Rochin case*.

Under subpoint B of Point I, the Petitioner claims that he relies upon the "generative principles" set forth in the Bill of Rights, and that the court should consider these principles in determining whether Petitioner's conviction offends against the Due Process of the Fourteenth Amendment. In this instance, it seems to be the "generative principles" of the Fourth and Fifth Amendments which should be particularly considered at this time.

The Respondent would answer this claim by pointing out that the use of evidence in a state court, which many have been secured in violation of the Fourth Amendment, is not prohibited by the Fourteenth Amendment. *Wolf v. Colorado*, supra; *Irvine v. California*, supra. This very question was present in the *Rochin case*, supra, as Justice Jackson pointed out in the *Irvine case*, at p. 133, in the following language:

> "Although Rochin raised the search and seizure question, this Court studiously avoided it and never once mentioned the Wolf case. Obviously, it thought that illegal search and seizure alone did not call for reversal."

The *Rochin case*, which the Petitioner claims announces the rule upon which he relies certainly rejects this claim which he now makes.

The Respondent does not believe that a switch to the "generative principles" of the Fifth Amendment serves the cause of the Petitioner. The claim is that this evidence was in effect compulsory self-incrimination. It is settled that the Fourteenth Amendment does not embrace a right similar to that guaranteed by the Fifth Amendment. *Twining v. New Jersey*, supra; *Adamson v. California*, supra.

Historically, the self-incrimination privilege prohibited testimonial compulsion and had nothing to do with compulsory disclosure of physical condition. (See *Inbau, Self Incrimination; Morgan, The Privilege Against Self Incrimination*, 34 Minn. L. Rev. 1.) *Wigmore* in his book *On Evidence*, 3rd Ed., Vol. III, p. 362, § 2263, supports this principle as follows:

> "Looking back at the history of the privilege (ante, sec. 2250) and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence."

"In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion. The one idea is as essential as the other."

This court has also followed this rule in an opinion written by Mr. Justice Holmes, *United States v. Holt*, 218 U. S. 245, 252, where it was stated:

"Another objection is based upon an extravagant extension of the Fifth Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

This historical view is reflected in the *American Law Institute's Model Code of Evidence* (1942): *Rule* 203 provides that any person may refuse to disclose any matter that will incriminate him, and *Rule* 205 provides as follows:

"No person has a privilege under Rule 203 to refuse (a) to submit his body to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition, or (b) to furnish or to permit the taking of samples of body fluids or substances for analysis."

MICRO CARD
TRADE MARK ®

MATTHEW BENDER & COMPANY
MB
MB-56

6006

The fact that the American Law Institute Advocates such rule for its *Model Code of Evidence* should also indicate that the taking of blood samples and the use of the same is not shocking, brutal conduct which would offend against the sense of justice, which is embodied in the Due Process Clause of the Fourteenth Amendment.

In blood sample cases where the issue of self-incrimination has been raised, the courts have rejected the contention and held that the privilege did not apply. *State v. Cram*, supra; *State v. Sturtevant*, 96 N.H. 99, 70 A. 2d 909; *State v. Ayres*, supra; *State v. Alexander*, 7 N.J. 585, 83 A. 2d 441; *Block v. People*, supra; *State v. Cash*, 219 N.C. 818, 15 SE 2d 277; *United States v. Williamson*, 4 U.S.C.M.A. 320.

This contention was made in the *Rochin case* and the Court refused to base its decision on such ground. As herein pointed out, the Respondent submits that there is no merit to the contentions made in subpoint B of Point I.

II.

The Respondent joins the Petitioner in the position which he has taken in Point II. The Petitioner is now in custody and is serving the balance of the original sentence for involuntary manslaughter. The Respondent therefore concedes that this cause is not moot.

CONCLUSION

The judgment of the Supreme Court of New Mexico denying the Petitioner a Writ of Habeas Corpus is correct inasmuch as the lower court did not in any way violate any constitutional guaranty protected by the Due Process Clause of the Fourteenth Amendment. The judgment of the Supreme Court of New Mexico should be affirmed.

Respectfully submitted,

DEAN S. ZINN,
407 Don Gaspar Avenue,
Santa Fe, New Mexico,

RICHARD H. ROBINSON,
Attorney General of the
State of New Mexico,

WALTER R. KEGEL,
Assistant Attorney General of the
State of New Mexico,

PAUL L. BILLHYMER,
Assistant Attorney General of the
State of New Mexico,

Attorneys for Respondent.